FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 672

SOEWAPADJI and 218 alien Indonesian Seamen similarly situated,

Petitioners,

vs.

I. F. WIXON, as Custodian of Petitioners in the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners Soewapadji and 218 alien Indonesian seamen respectfully allege:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioners are all subjects of the Kingdom of The Netherlands and resident on the Island of Java in the Dutch East Indies. Their names are contained in a stipulation concerning parties (Tr. p. 12ff), but subsequent to the stipulation, Jan Allie, Samat Suker, Matheos Bin Bio, Ismail Boki, Saleh Nampiro, Supidin Pati and Selan Bin Abduldjalil directed the dismissal of their appeal to the Circuit Court of Appeals, and are no longer petitioners in this proceeding. The petition therefore involves 219 Indonesian seaman all similarly situated. They were all members of the crews of Dutch or British vessels and have refused to serve on such vessels for the reason that the Indonesians are in revolt against the Kingdom of The Netherlands, which latter is being assisted by the British in suppressing this revolt. The Indonesians, however, have established an independent government which is not yet recognized and the petitioners in this case are regarded by the Kingdom of The Netherlands as having engaged in treasonable activities.

The petitioners came to the United States as seamen on Dutch and British vessels, and upon arrival in various ports of the United States left their vessels and refused to serve further. In the case of many of the petitioners, if not all, the Immigration and Naturalization Service of the United States granted periods of time, upon the expiration of which the petitioners were to leave the United States or face deportation.

All of the petitioners have overstayed their leave and warrants of deportation in the case of each of them have been issued after hearings fair on their face. Under normal conditions and in the absence of the special circumstances set forth in the petition for the writ of habeas corpus filed in the District Court of the United States for the Northern District of California, Southern Division (Tr. pp. 3, 4 and 5), all of the petitioners would be clearly deportable as merchant seamen who have overstayed their visiting period, after the expiration of which their presence in the United States became unlawful.

The order to show cause (Tr. p. 8) was issued June 12, 1946, and served on the respondent, I. F. Wixon, as District Director, Immigration and Naturalization Service, Department of Justice, in whose custody petitioners then were, a few minutes before the vessel, "SS Marine Lynx" was to leave the port of San Francisco with all of the petitioners on board to be deported to Java. As soon as the order to show cause was served on the respondent, he caused all of the petitioners to be removed from said vessel and detained them in his custody at the Receiving Station at 630 Sansome Street, in the City and County of San Francisco, State of California.

Upon the return of the order to show cause, June 13, 1946, the District Court discharged the order and dismissed the petition for the writ. (Tr. p. 11.)

The same day notice of appeal to the Circuit Court of Appeals for the Ninth Circuit was filed (Tr. p.

11), and thereafter respondent, I. F. Wixon, petitioned said Circuit Court of Appeals for an order permitting him to remove all of the petitioners to an immigration camp maintained by the Immigration and Naturalization Service at Crystal City, Texas. By special order of the Attorney General, respondent I. F. Wixon was appointed custodian of the persons of the petitioners anywhere in the United States and in his new capacity was substituted as respondent in place of I. F. Wixon, District Director, Immigration and Naturalization Service, Department of Justice. (Tr. p. 28.) Thereafter, the Circuit Court of Appeals for the Ninth Circuit made an order authorizing said respondent to remove all of the petitioners to an immigration camp maintained by the Immigration and Naturalization Service at Crystal City, Texas, where they now are.

On the 13th day of September, 1946, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (Tr. p. 33) and on the 9th day of October, 1946, the said Court made an order staying the mandate until the 9th day of November, 1946, provided petitioners within the period of said stay should file their petition for certiorari in the Supreme Court. (Tr. p. 34.)

B.

JURISDICTION.

The jurisdiction of this Court rests on § 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C. § 347.)

C.

STATUTES AND REGULATIONS INVOLVED.

Pertinent Provisions of the Immigration Laws:

Section 213, Title 8, *U.S.C.A.*

"No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; * * *."

Section 214, Title 8, *U.S.C.A.*

"Any alien, who at any time after entering the United States is found to have been at the time of entry not entitled under this chapter to enter the United States, or to have remained therein for a longer time than permitted under this chapter, or regulation made thereunder, shall be taken into custody and deported in the same manner as provided for in Sections 155 and 156 of this Title * * *."

Section 215, Title 8, *U.S.C.A.*

"The admission to the United States of an alien excepted from the class of immigrants by Clause * * * (5) * * * of Section 203 of this Title * * *

shall be for such time and under such conditions as may be by regulations prescribed * * *."

Section 203, Title 8, *U.S.C.A.*

"When used in this chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States except * * * (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman * * *."

Section 155, Title 8, *U.S.C.A.*

Describes what aliens shall be deported.

Section 156, Title 8, *U.S.C.A.*

Describes the method of deporting aliens illegally in this country.

Section 120.2, Title 8, *U.S.C.A.*

"As used in Section 3(5) of the Immigration Act of 1924 (Section 203, Title 8, U.S.C.A.), the term (bona fide alien seaman) means any alien who, in good faith, is signed on the articles of a vessel arriving at a port of the United States from any place outside thereof, employed in any capacity on board such vessel, and seeking to enter the United States temporarily solely in the pursuit of his calling as a seaman, with the intention of departing with the vessel or reshipping on board any other vessel for any foreign port or place."

Section 120.21 (2), Title 8, *U.S.C.A.*

"Any alien who, upon arrival, establishes that he is a bona fide seaman, as defined in section 120.2

of this part, is admissible as a non-immigrant under section 3(5) of the Immigration Act of 1924, and is not inadmissible under the other provisions of this part and of part 175, may be temporarily admitted for such period of time as the examining immigrant inspector shall designate, not to exceed, however, the time the vessel on which the alien arrives remains in the United States, and in no event to exceed twenty-nine (29) days. * * *"

United States Constitution, Amendment VIII: "Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted".

United States Constitution, Amendment IX: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

D.

QUESTIONS PRESENTED AND REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The question presented is whether or not the special circumstances which exist in this case create a situation where the writ of habeas corpus should be granted even though, in the absence of these circumstances, the writ is customarily and properly denied.

These special circumstances are set forth in the petition in paragraphs III, IV and V thereof (Tr. pp. 3, 4, 5) from which we quote as follows:

"III

"* * * That the aliens hereinabove named are under warrant of deportation to Madoera, Netherlands East Indies; that your petitioner is informed and believes and upon such information and belief alleges the fact to be that said aliens are to be deported on the vessel 'Marine Lynx' from the Port of San Francisco tomorrow morning, June 13, 1946; that Madoera, Netherlands East Indies, is controlled by the British and Dutch Governments, as are other seaports of Java; that said Indonesian petitioners abovenamed are being deported for refusal to man Dutch or British ships sailing to Indonesia, and that to man said ships would be for these aliens an act of treason to the Government of the Republic of Indonesia to whom they are subject and to which said aliens now claim allegiance; that to deport the said aliens at this time to the Netherlands East Indies would be a violation of human rights and cruel and unusual punishment, and a violation of the United States Constitution and of the fundamental principles of the American policy of giving political asylum to the members of a race struggling to establish their own form of government and to free themselves from colonial exploitation, in that if said aliens are disembarked in the Netherlands East Indies they will be arrested as disloyal and traitorous to The Netherlands Government and subjected to severe punishment and possible execution.

"IV

"That said aliens have substantially complied with the spirit of the Immigration Laws, which

said laws were never made for the purpose of requiring aliens to engage in activities which result in the suppression of their own people by an imperialistic power; that at the present time very unusual conditions exist, in that the people of Indonesia and particularly of Java have declared their independence of the Dutch Government and recognize their own independent government. For this reason the aliens state that they should be allowed to remain in the United States until the situation in the Dutch East Indies has clarified itself and until the Indonesian Republican movement is recognized; and that during the time they remain in the United States they should be allowed to make a living here. Said aliens allege that they should be allowed to work in the United States not only to support themselves but to support their families.

"V

"That extension of temporary admission was improperly denied by the Immigration and Naturalization Service and that not to extend temporary stay under the circumstances of this case where strict enforcement of the rules and regulations of the Department of Immigration and Naturalization means imprisonment and possible death, amounts to an abuse of discretion and a violation of American law and tradition under which this country is an asylum for political refugees whose only offense is that they have struggled for independence; * * *"

These are the special circumstances above referred to, and there is no denial in the record of the facts above set forth.

This case has great and far-reaching political implications. We have barely concluded a great world war, fought for the liberation of the peoples of the world from the tyranny and savagery of fascism. During the course of this war, and prior to our entrance therein, Winston Churchill and Franklin Roosevelt met on a vessel in the waters of the North Atlantic and there announced to the world that the principles for which the allied nations were fighting were embodied in the so-called "Atlantic Charter". It is provided in the third paragraph of the Atlantic Charter "that they (i.e., the contracting powers) respect the rights of all people to choose the form of government under which they will live."

Great Britain today is engaged in a world-wide effort to suppress every form of popular government. This is the case in India, in Greece, in Yugoslavia, and in Indonesia, where Great Britain, not hesitating to violate her solemn agreement, is rendering all possible assistance to the Dutch government in suppressing the effort of the Indonesians to "choose the form of government under which they will live". The United States, through its State Department and Department of Justice in this case, is likewise engaged in violation of its solemn agreement and doing its bit through these deportation proceedings to give aid and comfort to the Dutch government in stifling the aspirations of its subjects for freedom, by handing over to that government these rebellious Indonesian seamen for punishment by imprisonment or death.

The questions before this Court are:

(a) Will it stay the hand of the Attorney General in his effort to hand the petitioners over to the Dutch Government so that they may be punished for daring to assert the rights solemnly guaranteed them by the United States and Great Britain under the terms of the Atlantic Charter?

(b) Will it correct the gross abuse of discretion on the part of the Attorney General in issuing deportation warrants where the almost certain consequences are death to the deported?

(c) Will this Court, in violation of the historic precedents of the United States, deny to petitioners the right of political asylum?

(d) Will this Court permit the use of the deportation process when the result of deportation is to inflict upon the deported cruel and unusual punishment?

The reasons relied on for the allowance of the writ are that, although some of the above questions have been presented to and decided in the negative by the lower courts, the Supreme Court has rendered no authoritative decision on the issues and questions presented by this petition.

These questions are of profound importance to all aliens who come in contact with the Department of Justice, and particularly to such of them as belong to colonial groups seeking independence from their imperialist masters. As a consequence of the just con-

cluded war for liberation and national freedom, colonial peoples everywhere are demanding that the imperialist powers live up to the representations and promises made for the purpose of soliciting and obtaining material assistance from the colonial peoples in the United Nations struggle against fascism. Colonial peoples are on the march for their independence, and the questions presented by this petition will become of ever increasing importance and should be decided by the Supreme Court.

Wherefore your petitioners pray that a writ of certiorari issue out of this Court to the Circuit Court of Appeals for the Ninth Circuit requiring that Court to certify and send to this Court a transcript of all the proceedings of such Circuit Court of Appeals for the Ninth Circuit had in this case; that the order and judgment of said Circuit Court of Appeals be reviewed and determined by this Court, and the order finally reversed and the cause remanded for further proceedings and further, that the petitioners be granted such other and additional relief as may be proper.

Dated, San Francisco, California,
October 30, 1946.

SOEWAPADJI AND 218 ALIEN INDONESIAN SEAMEN SIMILARLY SITUATED,
Petitioners,

By HAROLD M. SAWYER,
Their Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

JURISDICTION.

The jurisdiction of this Court rests on § 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. § 347.) The text of this statute is found in Appendix A of this brief.

II.

DATES OF ENTRY OF OPINIONS AND JUDGMENTS.

Judgment of the trial Court was entered on June 13, 1946. (Tr. pp. 10, 11.)

The opinion of the Circuit Court of Appeals for the Ninth Circuit was rendered and filed September 13, 1946. (Tr. p. 29ff.)

Judgment of the Circuit Court of Appeals was entered September 13, 1946. (Tr. p. 33.)

No petition for rehearing was filed.

III.

STATEMENT OF FACTS.

The petitioners are all subjects of the Kingdon of The Netherlands and resident on the Island of Java in the Dutch East Indies. Their names are contained in a stipulation concerning parties (Tr. p. 12ff), but subsequent to the stipulation, Jan Allie, Samat Suker, Matheos Bin Bio, Ismail Boki, Saleh Nampiro, Supidin Pati and Selan Bin Abduldjalil directed the dismissal of their appeal to the Circuit Court of Appeals, and are no longer petitioners in this proceeding. The petition therefore involves 219 Indonesian seaman all similarly situated. They were all members of the crews of Dutch or British vessels and have refused to serve on such vessels for the reason that the Indonesians are in revolt against the Kingdom of The Netherlands, which latter is being assisted by

the British in suppressing this revolt. The Indonesians, however, have established an independent government which is not yet recognized and the petitioners in this case are regarded by the Kingdom of The Netherlands as having engaged in treasonable activities.

The petitioners came to the United States as seamen on Dutch and British vessels, and upon arrival in various ports of the United States left their vessels and refused to serve further. In the case of many of the petitioners, if not all, the Immigration and Naturalization Service of the United States granted periods of time, upon the expiration of which the petitioners were to leave the United States or face deportation.

All of the petitioners have overstayed their leave and warrants of deportation in the case of each of them have been issued after hearings fair on their face. Under normal conditions and in the absence of the special circumstances set forth in the petition for the writ of habeas corpus filed in the District Court of the United States for the Northern District of California, Southern Division (Tr. pp. 3, 4, 5), all of the petitioners would be clearly deportable as merchant seamen who have overstayed their visiting period, after the expiration of which their presence in the United States became unlawful.

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Service, Department of Justice, in whose custody petitioners then were, a few minutes before the vessel, "SS Marine Lynx" was to leave the port of San Francisco with all of the petitioners on board to be deported to Java. As soon as the order to show cause was served on the respondent, he caused all of the petitioners to be removed from said vessel and detained them in his custody at the Receiving Station at 630 Sansome Street, in the City and County of San Francisco, State of California.

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maintained by the Immigration and Naturalization Service at Crystal City, Texas, where they now are.

On the 13th day of September, 1946, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (Tr. p. 33), and on the 9th day of October, 1946, the said Court made an order staying the mandate until the 9th day of November, 1946, provided petitioners within the period of said stay should file their petition for certiorari in the Supreme Court.

IV.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Ninth Circuit erred in the following respects:

(1) In failing to hold that the deportation warrants were void because of an abuse of discretion on the part of the Attorney General in that he issued the warrants notwithstanding the fact that the consequences of deportation to the deported were certain imprisonment and probable execution.

(2) In denying petitioners the right of political asylum.

(3) In permitting the use of the deportation process when the result of deportation is to inflict upon the deported cruel and unusual punishment.

(4) In failing to grant the prayer of the petition and release petitioners upon writs of habeas corpus.

V.

ARGUMENT.

FIRST ASSIGNMENT OF ERROR: FAILURE TO HOLD THAT THE DEPORTATION WARRANTS WERE VOID BECAUSE OF AN ABUSE OF DISCRETION ON THE PART OF THE ATTORNEY GENERAL IN THAT HE ISSUED THE WARRANTS NOTWITHSTANDING THE FACT THAT THE CONSEQUENCES OF DEPORTATION TO THE DEPORTED WERE CERTAIN IMPRISONMENT AND PROBABLE DEATH.

It is petitioners' position that the Attorney General was guilty of a gross abuse of discretion in issuing deportation warrants when the execution of these warrants means certain imprisonment and possible execution of the petitioners. Petitioners freely concede that if the execution of the warrants meant merely some financial or other hardship and did not involve deprivation of liberty and life, there would, in view of the fact that the proceedings before the Immigration and Naturalization Service were fair on their face, be no ground upon which writs of habeas corpus could issue.

The special circumstances of this case, however, take it out of the general rule. These circumstances are set forth in the petition (Tr. pp. 3, 4, 5) and have been recited both in the petition for certiorari and in this brief. There is no effort on the part of respondent to contradict in the slightest degree the allegations of the petition in this regard. The special circumstances therefore are on the record admitted to exist.

In this connection we refer to the case of *United States v. Uhl,* 20 Fed. Supp. 928. This case arose

upon an order to show cause why a writ of habeas corpus should not be issued. In this case, as in the case of the petitioners, there was no question raised as to illegal entry or the right to deport. The sole question was whether or not an alien unlawfully in the United States has a right when deportation is sought, to voluntarily deport himself to a country of his choice or whether the Commissioner of Immigration is vested by statute with authority to select the country to which he shall be deported.

The alien wished to be deported to Canada rather than to Poland, where he alleged he was liable to execution for political crimes.

The Court found, "There is no substantial suggestion here that the relator is liable to execution upon his return to Poland for any political crime or reason".

The significant part of the opinion, however, is contained in the following language:

> "However much the court may differ from the Secretary of Labor as to the place to which deportation should be made, it is not a subject for review by the court *unless, perhaps, where it was made clear after the order of deportation was issued that deportation to the country named in the order would almost certainly mean death to the alien guilty only of political crimes and even then the interference could only be justified upon the ground that the Secretary of Labor was guilty of such gross abuse of discretion as to raise a question of law.*" (p. 930.) (Emphasis added.)

The clear inference from this case is that if it had been established that deportation of the petitioner to Poland would have resulted in his execution for a political crime committed in Poland, the Court would have held the issuance of a warrant of deportation under such circumstances constituted an abuse of discretion so gross that the Court would be justified in granting relief to the petitioner.

That is precisely the situation in the case of these Indonesian petitioners. Unlike the *Uhl* case, supra, it *does* appear here that there is very real reason to believe that the execution of these deportation warrants will entail certain imprisonment and probable execution of petitioners. This, says the Court in the *Uhl* case, is an abuse of discretion so gross as to raise a question of law and to entitle the petitioner to release on habeas corpus.

SECOND ASSIGNMENT OF ERROR: DENIAL OF PETITIONERS' RIGHT OF POLITICAL ASYLUM.

The Circuit Court of Appeals for the Ninth Circuit held that aliens illegally in the United States have no right of asylum therein. For this position reliance is placed upon *Ex parte Kurth,* 28 Fed. Supp. 258, and *Glikas v. Tomlinson,* 49 Fed. Supp. 104.

That there was historically a right of political asylum in the United States cannot be successfully denied. Even in *Ex parte Kurth,* supra, Judge Yankwich conceded this fact. But his contention is that

the policy of restrictive immigration adopted after the Civil War in effect abolished the right of aslyum.

Even though the constitutionality of statutes restricting immigration have been upheld by the Supreme Court, it nevertheless is true that that Court has not yet ruled that a political refugee must, through the process of deportation, be condemned to imprisonment and death for political crimes committed in the country to which he is to be deported. There may not be any general right of asylum, but there certainly was historically such a right and it should be recognized where its denial means death to the political refugee.

The contention was made in this case that the right of asylum having once existed, it was not within the competence of Congress to destroy that right, and in support of this contention reliance was had on the Ninth Amendment to the Constitution of the United States, which reads as follows:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

In answer to this argument, Judge Yankwich, completely disregarding the language of the Constitution, said:

> "The Constitution of the United States is not a statute. It does not confer any rights except in the instances where those rights are specifically enumerated." (p. 264.)

Judge Yankwich therefore completely emasculated the Ninth Amendment.

The argument in support of the second assignment of error, like the argument on all the assignments, is predicated upon the special circumstances existing in this case, namely, that deportation means imprisonment and death to the deported.

THIRD ASSIGNMENT OF ERROR: PERMITTING THE USE OF THE DEPORTATION PROCESS WHEN THE RESULT OF DEPORTATION IS TO INFLICT UPON THE DEPORTED CRUEL AND UNUSUAL PUNISHMENT.

Until the decision of this Court in the case of *Bridges v. Wixon,* 326 U. S. 135, 89 L. Ed. 2103, the general rule was that inasmuch as deportation is not a criminal proceeding, no question of punishment is involved and therefore the Eighth Amendment to the Constitution forbidding the imposition of cruel and unusual punishment, is not applicable to a deportation case. But in *Bridges v. Wixon,* supra, Mr. Justice Murphy, in his concurring opinion, stated:

> "It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime'. Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood for-

> ever. Return to his native land may result in poverty, persecution and even death. * * *" (326 U. S. at p. 163; 89 L. Ed. at p. 2120.)

The view of the Supreme Court today, or at least the view of Mr. Justice Murphy, is, therefore, that notwithstanding the non-criminal character of deportation proceedings, deportation can be the equivalent of punishment. Hence the Eighth Amendment does apply and deportation should not be resorted to when the effect of the execution of the warrant is to inflict imprisonment or death upon the deported.

There is, as far as we know, only one case in the Federal Reports that passes directly upon this issue, namely, that deportation can be the equivalent of the infliction of cruel and unusual punishment, and when this is the case the petitioner will be released on a writ of habeas corpus.

In *In re Weinberg,* 26 Fed. Supp. 283, the facts were as follows: A warrant of deportation had been issued because at the time of entry of the alien into the United States he was not in possession of an unexpired immigration visa. The alien was a Jew and he was about to be deported to Czechoslovakia. The period of time involved was 1938. As in the case of these Indonesian petitioners, the alien in the *Weinberg* case was clearly deportable. In both cases the proceedings were fair on their face, and if the situation had been a normal one and no special circumstances had existed, there would have been no basis for the issuance of a writ of habeas corpus.

However, the writ did issue and the alien was discharged from custody of the Immigration and Naturalization Service. We quote from the opinion of Sullivan, District Judge (at page 284):

> "It is a matter of common knowledge that at the present time in Central Europe the Jews are being persecuted, their property confiscated and that they are obliged to seek sanctuary in other countries.
>
> Under conditions as they now exist it would be cruel and inhuman punishment to deport this petitioner to Czechoslovakia, belonging as he does to the race which is thus being persecuted and exiled, especially when the charge against him is that at the time of his entry into the United States he was not in possession of an unexpired immigration visa. I do not believe that the immigration laws contemplate any such strict compliance with the letter thereof, as would oblige the court to return at this time a Jew to a country where his property would be confiscated, where his life might be in jeopardy, and from which, if he were permitted to enter it at all, he would be forced immediately to flee.
>
> The prayer of the petition for habeas corpus is granted, the petition is sustained, and petitioner discharged from custody."

In the *Weinberg* case the writ issued to save an alien from racial persecution, and in the case of these appellants the writ is sought to save them from political persecution. There is in fact, however, no distinction between the two cases and persecution is

persecution with all of its attendant results, whether predicated upon a difference in race or upon political activity. The principle involved is precisely the same and the consequences to the individual are no different in the one case than they are in the other.

FOURTH ASSIGNMENT OF ERROR: FAILURE TO GRANT THE PRAYER OF THE PETITION AND RELEASE PETITIONERS UPON WRITS OF HABEAS CORPUS.

This is a conclusion drawn from the arguments made with respect to the other assignments of error. It rests upon the premise that to deport a person to a place where he will suffer persecution because of race, confiscation of property, imprisonment or death, is cruel and unusual punishment, and the deportation of persons who will suffer like consequences by reason of political activity or views is governed by the same principle. We cannot believe that the immigration laws were ever designed to permit deportation where the consequences to the persons deported are persecution, confiscation of property, imprisonment or death. The writ of habeas corpus is the proper method of testing the validity of a deportation order when such consequences will follow its execution, and the writ should have been issued by the Circuit Court of Appeals.

VI.

CONCLUSION.

This Court holds in its hands the fate of these Indonesian petitioners. That is the real issue in this case which cannot be obscured by the sophistry that, because the deportation proceedings and hearings were fair on their face, there is no ground for the issuance of the writ, regardless of the consequences to the deported.

We are not in this case dealing with aliens who have been accused of moral turpitude or of any crime. The technical offense upon which the warrants of deportation are based, is that, having overstayed their leave as merchant seamen, they are illegally in the United States. But why did they overstay their leave? Because they refuse to sail on British and Dutch vessels loaded with arms, munitions of war, and troops for the suppression of the fight for Indonesian independence. They refuse to assist the imperialist Dutch Government in an effort to suppress a revolution fought by their brothers and friends to secure freedom. It was in just such a struggle that this Country was born. Can it be that this Court will permit the use of the immigration laws for the purpose of enabling the Dutch Government to punish its rebellious subjects? Will this Court send these Indonesian seamen, whose only offense is support of a struggle for Indonesian freedom, back to Java and certain persecution if not death? Will this Court permit the use of the immigration laws for the purpose of indirectly cooperating with the Dutch and British in their effort to destroy Indonesian freedom?

It was said by the respondent in the Circuit Court of Appeals that for the Court to grant the writ of habeas corpus in this case it would have to transcend its powers and usurp the powers of other branches of the government. On the contrary, all that the Court will be doing in issuing its writ of habeas corpus in this case is declaring that the gross abuse of discretion on the part of the Attorney General in issuing deportation warrants where the almost certain consequences are death to the deported, renders the warrants void even though fair on their face. No such legalism as "fair on their face" should obscure the real issues, and it is respectfully submitted that the writ of habeas corpus should issue and that all of the petitioners should be discharged from custody.

Dated, San Francisco, California,
October 30, 1946.

Respectfully submitted,
HAROLD M. SAWYER,
Counsel for Petitioners.

GEORGE R. ANDERSEN,
GLADSTEIN, ANDERSEN, RESNER,
SAWYER & EDISES,
LEO GALLAGHER,
KATZ, GALLAGHER & MARGOLIS,
Of Counsel.

(Appendix A Follows.)

Appendix A

§347. (*Judicial Code, section 240, amended.*) *Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.* (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

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OCTOBER TERM, 1946

No. 672

SOEWAPADJI AND 218 ALIEN INDONESIAN SEAMEN SIMILARLY SITUATED, PETITIONERS

v.

I. F. WIXON, AS CUSTODIAN OF PETITIONERS IN THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 29–32) is reported at 157 F. 2d 289.

JURISDICTION

The judgment of the circuit court of appeals was entered September 13, 1946 (R. 33). The petition for a writ of certiorari was filed November 5, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether otherwise valid warrants for the deportation of certain Indonesian seamen who overstayed their visiting period in the United States are invalid because on their return to Indonesia they might be subjected to punishment on account of their desertion from Dutch ships and adherence to the Indonesian revolt.

STATUTE AND REGULATIONS INVOLVED

The Immigration Act of 1924 (May 26, 1924, c. 190, 43 Stat. 153), as amended, provides, in pertinent part, as follows:

> SEC. 3 (8 U. S. C. 203). When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * * (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, * * *.
>
> SEC. 14 (8 U. S. C. 214). Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19

and 20 of the Immigration Act of 1917. * * *

SEC. 15 (8 U. S. C. 215). The admission to the United States of an alien excepted from the class of immigrants by clause * * * (5), * * * of section 3, * * * shall be for such time and under such conditions as may be by regulations prescribed, * * * to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, maintain the status under which admitted, he will depart from the United States.

The pertinent Regulations prescribed under the foregoing provisions are as follows:

SEC. 120.2, 8 C. F. R., 1943 Cum. Supp.[1]

Bona fide alien seamen defined. As used in section 3 (5) of the Immigration Act of 1924 (43 Stat. 154; 8 U. S. C. 203), the term "bona fide alien seamen" means any alien who in good faith is signed on the articles of a vessel arriving at a port of the United States from any place outside thereof, employed in any capacity on board such vessel, and seeking to enter the United States temporarily solely in the pursuit of his calling as a seaman, with the intention of departing with the vessel or reshipping on board any other vessel for any foreign port or place.

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[1] This section was renumbered 120.2 in the 1943 Cumulative Supplement. The text appears in the original codification, 8 C. F. R. 7.2.

SEC. 120.21, 8 C. F. R., Supp. 1943.

Alien seamen seeking entry in pursuit of calling; when ordered detained; waiver of crew list visa. (a) Any alien who upon arrival establishes that he is a bona fide seaman as defined in § 120.2, is admissible as a nonimmigrant under section 3 (5) of the Immigration Act of 1924 and is not inadmissible under the other provisions of this part and of Part 175, may be temporarily admitted for such period of time as the examining immigrant inspector shall designate, not to exceed, however, the time the vessel on which the alien arrives remains in the United States and in no event to exceed 29 days, * * *

STATEMENT

Petitioners are alien Indonesians who came to the United States as seamen serving on Dutch and British vessels (R. 2, 3–4; Pet. 2). Upon arrival, they left the ships and refused to serve further on the asserted basis of their allegiance to the Indonesian revolt (R. 4; Pet. 2). Thereafter they were denied extensions of their temporary admissions (R. 5), and they were ordered to be deported (R. 4, 9–10).

On June 12, 1946, a petition for an order to show cause why a writ of habeas corpus should not issue was filed on behalf of petitioners in the District Court for the Northern District of California (R. 3–8). That petition asserted, *inter*

alia, (1) that the warrants of deportation and, consequently, petitioners' detention by respondent, were illegal and constituted an abuse of the Attorney General's discretion because " * * * to deport the said aliens at this time to the Netherlands East Indies would be a violation of human rights and cruel and unusual punishment, and a violation of the United States Constitution and of the fundamental principles of the American policy of giving political asylum to the members of a race struggling to establish their own form of government and to free themselves from colonial exploitation, in that if said aliens are disembarked in the Netherlands East Indies they will be arrested as disloyal and traitorous to the Netherlands Government and subjected to severe punishment and possible execution" (R. 4); and (2) that because of the unsettled conditions in Indonesia petitioners should be allowed to remain and make a living in the United States until the situation in the Dutch East Indies has cleared and the Indonesian Republican Movement is recognized (R. 5).

Respondent's return showed that petitioners were detained by him as District Director of the Immigration and Naturalization Service under warrants of deportation duly and regularly issued by the Attorney General of the United States after a proper hearing in the case of each petitioner (R. 9–10).

Thereupon, the district court denied the petition for a writ of habeas corpus and discharged the order to show cause (R. 11). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order of the district court was affirmed (R. 29–33).

ARGUMENT

Petitioners apparently sought to enter the United States as non-immigrants under the provisions of Section 3 of the Immigration Act of 1924, *supra,* p. 2, applying to "(5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman." Section 15 of the Act, *supra,* p. 3, provides that the admission of an alien seaman shall be "for such time and under such conditions as may be by regulations prescribed * * * to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States. * * *" While the record does not clearly show the factual basis for the deportation orders, the opinion of the court below states: "The warrants showed that appellants were being deported [pursuant to Section 14 of the Immigration Act of 1924, *supra,* pp. 2–3] because, after due hearings, it has been found that some of them were, at the time of

entry, not entitled to enter the United States, and that the others had remained in the United States for a longer time than was permissible." (R. 31.) The statement that some of the petitioners were not entitled to enter was probably predicated on the terms of Section 120.2 of the immigration regulations, *supra,* p. 3, defining "bona fide alien seamen." However, since it is not material to our argument, we shall pass the question of the possible illegal entry of some of the petitioners and assume that all were entitled temporarily to enter the United States under the terms of Sections 3 and 15 of the 1924 Act and regulations promulgated thereunder and that the only question here relates to petitioners' deportability for having overstayed their leave.

I. Preliminarily, in respect of petitioners' assertions as to the consequences of their being returned to Indonesia, it should be stated that we have been informed by officials of the State Department that on June 21, 1946, they were advised by the Netherlands Embassy that the Indonesian seamen had received explicit assurance in writing from the Netherlands consul in San Francisco that upon their repatriation and arrival in the Netherlands East Indies they would be free to go wherever they wished, and that it was the consul's personal opinion that the men would not be subjected to any repressive action. In view of these assurances and the fact reported in the public press that the Indonesian revolt is in the process of

peaceful settlement, the claimed basis for relief here would appear to have been dissipated.

II. Even, however, on the basis of the allegations in the petition for habeas corpus, it is clear that petitioners are not entitled to the relief sought. Petitioners concede that the deportation hearings were "fair on their face" (Pet. 3; see also R. 31) and that, except for the unusual circumstances of the consequences of deportation in their cases, they would clearly be deportable for having overstayed the temporary visiting period allowed by the statute and regulations (Pet. 15, 18). See Section 120.21 of the Regulations, 8 C. F. R., *supra,* p. 4. Thus, petitioners, in effect, confess that the immigration laws provide for their deportation, but contend that such action in their cases would be an abuse of discretion because it would deny them a right of asylum and result in the imposition of a cruel and unusual punishment. However, since the immigration laws are quite specific that persons such as petitioners shall be deported (see Section 14 of the Act, *supra,* pp. 2–3) and make no allowance for circumstances such as those upon which they rely, it is obvious that the issuance of the warrants of deportation merely followed the legislative directive and cannot, therefore, constitute an abuse of discretion.

Petitioners' reliance upon the Constitution is of no avail. Their transitory presence in the United States for the limited purposes of their

calling and for a limited period of time did not give them any such degree of attachment to or claim upon the United States as to require the application of constitutional rights, privileges, and immunities to them. While it is true that constitutional protections inure to residents of the United States as well as to its citizens, they do not extend to persons who do not at least have lawful residence here. Certainly, aliens who are excluded from the United States or whose presence in the United States is merely the result of a transitory privilege which has been lawfully terminated do not have any such rights.[2] As this Court said in *Turner* v. *Williams*, 194 U. S. 279, 292:

> * * * It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to

[2] It should be noted that petitioners' reliance upon the concurring opinion of Mr. Justice Murphy in *Bridges* v. *Wixon*, 326 U. S. 135, 161, discussing Bridges' rights under the Bill of Rights, ignores the vital fact noted therein that Bridges (in contradistinction to petitioners) had become invested with such rights due to the fact that he had lawfully entered and resided in the United States for a long period of time.

> concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.

Assuming, *arguendo,* however, that the protections of the Constitution do extend to petitioners, nevertheless the warrants of deportation do not violate any of them. While it may be, as petitioners assert, that they will be punished upon their return to Indonesia (but see p. 7, *supra*), that fact does not make the deportation itself a cruel and unusual punishment within the meaning of the Constitution. It is well established that "deportation, however harsh to the individual, is not punishment; it is a proceeding civil, and not criminal, in nature." *Bilokumsky* v. *Tod,* 263 U. S. 149, 154–155, 157; *United States ex rel. Zapp* v. *District Director of Immigration,* 120 F. 2d 762, 764 (C. C. A. 2). See also, e. g., *Costanzo* v. *Tillinghast,* 56 F. 2d 566, 567-568 (C. C. A. 1); *Kaichiro Sugimoto* v. *Nagle,* 38 F. 2d 207, 209 (C. C. A. 9).[3] In any case, exclusion from the

[3] The only reported decision to the contrary is *United States ex rel. Weinberg* v. *Schlotfeldt,* 26 F. Supp. 283 (N. D. Ill.), which petitioners cite. That decision, however, is patently erroneous and can only be explained by the fact that the trial judge was moved by the certainty of the treatment that awaited petitioner at Nazi hands in the event of deportation.

United States or deportation will probably result in hardship, and in many instances it may result in the most extreme hardship—economic, political, or otherwise—for the alien. However, it cannot be said that in excluding or deporting the alien the United States imposes any punishment. It merely exercises its plenary authority to determine who, when, and under what conditions aliens may be permitted to stay in the United States. See *Fong Yue Ting* v. *United States,* 149 U. S. 698; *United States ex rel. Hudak* v. *Uhl,* 20 F. Supp. 928 (N. D. N. Y.) Thus, it is wholly illogical to attribute responsibility to the United States for what may happen to the alien elsewhere by virtue of the exercise of this sovereign right of the United States.

As to petitioners' contention that deportation would deny them a right of asylum, the answer is clearly, as the court below noted (R. 32), that there is no such right. While the United States in the exercise of its plenary authority over immigration could, if it so desired, extend the privilege of asylum to aliens because of political repression elsewhere, to conclude that such aliens have an absolute right of asylum would be in derogation of the sovereignty of the United States. See analysis in *Ex parte Kurth,* 28 F. Supp. 258, 263-264 (S. D. Calif.); cf. *Glikas* v. *Tomlinson,* 49 F. Supp. 104, 108–109 (N. D. Ohio). In brief, the determination whether they should be given asy-

lum in the United States is essentially a political question and a burden which cannot be assumed by the courts or administrative officers. See *Glikas* v. *Tomlinson, supra.* Since Congress has not to date chosen to exercise its power to permit petitioners to stay in the United States, there is no alternative under our immigration laws but to effect their deportation.

CONCLUSION

For the foreging reasons, the judgment of the court below is clearly correct. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

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SOEWAPADJI and 218 alien Indonesian Seamen similarly situated,
Petitioners,

vs.

I. F. WIXON, as Custodian of Petitioners in the United States,
Respondent.

PETITION FOR REHEARING.

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Subject Index

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PETITION FOR REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Soewapadji and 218 alien Indonesian seamen, respectfully allege:

A.

STATEMENT OF MATTER INVOLVED.

On December 16, 1946, this Court denied the petition for certiorari filed by Soewapadji and 218 alien

Indonesian seamen similarly circumstanced, which petition was docketed in the office of the clerk of this Court, under No. 672, October term.

Under a dateline of December 16, 1946, Washington, the United Press stated:

> "The court was told by the Justice Department that Dutch authorities have promised to take no 'repressive action' against the seamen."

The only reason why a petition for habeas corpus was filed on behalf of these 219 Indonesian seamen, in the District Court of the United States, for the Northern District of California, was the fear that these Indonesians, if deported to Java, would be punished by the Dutch Government for conduct which that Government would construe to be treasonable.

The allegation of the original petition filed in the District Court was as follows:

> "That the aliens hereinabove named are under warrant of deportation to Madoera, Netherlands East Indies; that your petitioner is informed and believes and upon such information and belief alleges the fact to be that said aliens are to be deported on the vessel 'Marine Lynx' from the Port of San Francisco tomorrow morning, June 13, 1946; that Madoera, Netherlands East Indies, is controlled by the British and Dutch Governments, as are other seaports of Java; that said Indonesian petitioners above-named are being deported for refusal to man Dutch or British ships sailing to Indonesia, and that to man said ships would be for these aliens an act of treason to the Government of the Republic of Indonesia to

whom they are subject and to which said aliens now claim allegiance; that to deport the said aliens at this time to the Netherlands East Indies would be a violation of human rights and cruel and unusual punishment, and a violation of the United States Constitution and of the fundamental principles of the American policy of giving political asylum to the members of a race struggling to establish their own form of government and to free themselves from colonial exploitation, in that if said aliens are disembarked in the Netherlands East Indies they will be arrested as disloyal and traitorous to the Netherlands Government and subjected to severe punishment and possible execution." (Tr. p. 4.)

This allegation was never, at any stage of the proceedings, or in any Court, denied.

It was clearly apparent to all counsel in the case that the petitioners were, under ordinary circumstances, unquestionably deportable. They had had hearings, "fair on their face", and the proceedings would, under ordinary circumstances, have been regarded as beyond legal attack or review.

But there was, and still is, well-founded fear that deportation means, in this case, imprisonment and possibly death to the deported.

Notwithstanding that the unusual circumstances of this case above set forth were not denied anywhere in the record, and constituted the sole basis upon which the litigation was instituted and carried to the highest court in the land, this Court, according to the United

Press, accepted hearsay statements *ex parte* and in the absence of counsel for petitioners, to the effect that the Dutch Government had given assurances to our State Department, and the State Department had told the Justice Department, that no repressive action would be taken against the petitioners. Although the United Press does not so state, the only inference to be drawn from the dispatch quoted in full in Appendix A is that, upon the basis of these *ex parte* and hearsay representations by the Department of Justice, this Court declined to grant a petition which, in the absence of such representations, it might well have granted.

It is respectfully submitted that this is an unprecedented situation—when the highest court in the land exercises its discretion to grant or deny *certiorari* upon the unsupported, unsworn statements of the Department of Justice, concerning hearsay assurances made by the Dutch Government, and transmitted to the Justice Department through the State Department. And the error becomes all the more clearly evident when it is realized that these unsworn, hearsay statements went to the sole issue in the case.

The consequent danger to litigants is well illustrated by the following telegraphic correspondence.

Ever since the 16th day of December, 1946, counsel has endeavored, by every means within his power, to ascertain precisely what representations have been made by the Dutch Government to the State Department, what representations the State Department

made to the Justice Department, and what representations the Justice Department made to this Court —and with a signal lack of success.

On December 16, 1946, counsel sent a night letter to the Attorney-General, copy of which is as follows:

> "You doubtless know that the Supreme Court today denied the Petition of Soewapadji and 218 Indonesian seamen for certiorari. We have therefore exhausted our legal remedy. There remains, however, executive and legislative relief. Within the last three weeks, the President has by executive order suspended deportation indefinitely of 48 Estonians whose legal position is certainly no better than, nor different from, that of the 219 Indonesians represented by me as their attorney. In the closing hours of the 79th Congress, Senator Langer introduced a Resolution to suspend deportation of all Indonesians until December 31st, 1947. We are presenting a Petition to the President with signers in excess of 5000, requesting a stay of deportation. The cause of the Indonesians is supported by the most responsible and representative citizens of the country, both east and west, including, here in San Francisco, Bishop Edward L. Parsons, Robert W. Kenny, Attorney General of this State, the most powerful trade unions, both AFL and CIO, and their leaders. In the interest of fair play, in which I know you believe, I am urging you to refrain from any deportation of the Indonesians until both the President and the 80th Congress have had an opportunity to act. Please wire collect your views and what you propose to do."

Notwithstanding counsel's request for telegraphic reply at his expense, the above night letter was completely ignored by the Attorney-General, so that, on December 18, 1946, counsel sent a full-rate telegram to the Attorney-General, copy of which is as follows:

> "Please refer to my night letter to you dated December 16, 1946 relating to Soewapadji case in which petition for certiorari was denied. The United Press under dateline Washington, December 16, 1946, states the Court was told by Justice Department that Dutch authorities have promised to take no repressive action against the men. In view of fact that lives of 219 people are here at stake, I am asking you for a categorical report of what representations were made to you by the Dutch Government and by whom. If any such representations have been made, I insist that they be in such form and attended with such publicity as to insure amnesty to the Indonesians."

Not until December 20, 1946, did counsel receive any reply whatsoever from the Attorney-General. On December 20, 1946, counsel received a telegram, copy of which is as follows:

> "Regarding your telegram December 18 concerning Indonesians, assurance no reprisals by Dutch authorities transmitted to this Service by State Department, as such matters with foreign governments handled by that Department."

On the same day, there was served on counsel, by the Immigration and Naturalization Service in San Francisco, a letter, copy of which is as follows:

"Gentlemen:

The Attorney General has directed that I communicate the following message to you:

'Your petition for further stay deportation 219 Indonesians whose cases have been decided by Supreme Court is denied. Under law their deportation mandatory. With Reference to the possibility of their persecution for political reasons upon return to Java you are advised competent Netherlands authorities in United States have given assurance the Netherland Government is on record to the effect that none of the Indonesian seamen in question need fear prosecution or any other reprisals from Netherland authorities if they are returned to Java. In addition State Department has been consulted and has expressed the opinion that political considerations in these cases are not such as to require a deviation from the normal procedure for deportation of deserting alien seamen.'

Very truly yours,
/s/ I. F. WIXON
I. F. Wixon,
District Director
San Francisco District."

In view of the evasive replies of the Attorney-General and the tacit refusal to give categorical answers to questions asked, counsel decided to approach the Dutch Government itself. Accordingly, on December 21, 1946, counsel sent a night letter to Dr. A. Loudon, the Netherlands Ambassador at Washington, D. C., copy of which is as follows:

"I am representing 219 Indonesian seamen held by Immigration Department in Crystal City,

Texas, under warrants of deportation to Java. Have conducted litigation on their behalf for writ of habeas corpus through all courts and up to Supreme Court which last Monday denied our petition. Our action was based on fear that Netherlands Government would punish these Indonesians as traitors if they were returned to Java. San Francisco Chronicle this morning published statement that proposed treaty between Republic of Free Indonesia and Netherlands Government has been ratified by Netherlands Parliament. Will Your Excellency please confirm fast wire collect whether or not this is the case and also whether or not treaty includes full amnesty to all who have taken part in struggle for Indonesian freedom, including 219 seamen I represent. Upon your answer will depend my future moves. Please give this matter your immediate attention."

The request in this night letter "for immediate attention" brought no reply until December 24, 1946, at which time a telegram was received from the Netherlands Ambassador, copy of which is as follows:

"Referring to your telegram of December 21 I beg to point out as known already to Messrs. Katz, Gallagher and Margolis Los Angeles that several months before the signing of the agreement mentioned in your telegram the Indonesian seamen represented by you have been given explicit assurances by the Netherlands authorities that no retaliatory measures of any kind will be taken against them and that on their arrival in the Netherlands East Indies they will be allowed to proceed freely wherever they wish to go."

A glance at this telegram shows its evasive character. The so-called assurances are based upon some communication, previously made to Katz, Gallagher and Margolis, of which counsel is assumed to be ignorant.

On the same day, December 24, 1946, counsel prepared a night letter to Dr. A. Loudon, the Dutch Ambassador, but inasmuch as this was the day before Christmas, the night letter was not actually dispatched until December 26, 1946, owing to disruption due to the holidays. A copy of this night letter is as follows:

> "Reurtel today, neither Gallagher nor I have ever been satisfied with assurances referred to by you. They were expressed in document addressed 'To Whom It May Concern' and signed by a deputy consular officer in Los Angeles. Dr. Van Woerden, Consul General here, says no one on Pacific Coast has authority to give such assurances. Am therefore asking you for categorical answer my questions: Has the agreement referred to been ratified by Netherlands Parliament? Does it contain general amnesty. Think assurances should be addressed to our State Department and not to any individual nor 'To Whom It May Concern'. Issue is too serious to rest security of 219 people upon such indefinite statements heretofore made. What I want now is definite assurances to our Government and not any reference to assurances heretofore given to Gallagher. In absence of such assurances shall be obliged to petition Supreme Court for rehearing and challenge the accuracy of representations made to the Court by Justice Department. Please reply fast wire

collect as my time to petition for rehearing is limited."

The following day, December 27, 1946, a telegram was received from the Dutch Ambassador, copy of which is as follows:

"Suggest that you apply to State Department."

Having met nothing but evasion and indifference from the Attorney-General and the Dutch Ambassador, counsel, in despair, upon receipt of the last quoted telegram, sent a full-rate telegram to our State Department, on December 27, 1946, copy of which is as follows:

"December 16, 1946, Supreme Court denied petition for certiorari concerning application for writ habeas corpus for 219 Indonesian seamen represented by me, case 672 October term, and announced that it had been informed by Justice Department that Netherlands Government had given assurances that no repressive action would be taken against these seamen. Have endeavored ascertain from Loudon Netherlands Ambassador and Clark Attorney General categorical answers to these questions: One, did Netherlands Parliament as announced by Associated Press December 21 ratify treaty between Free Indonesian Republic and Netherlands Government establishing new geographical and political subdivision in East Indies, and Two, does treaty contain complete amnesty for all who fought for Indonesian independence including the seamen I represent. So far have received nothing but evasive answers from Netherlands Ambassador and Clark. Former suggests I communicate you. I have only 25 days

from December 16 to file petition for rehearing Supreme Court and unless I can get assurances of amnesty and ratification of treaty, shall be obliged file such petition, attacking accuracy and good faith Justice Department. In view of shortness of time I shall prepare petition for rehearing Tuesday unless before close business Monday I received satisfactory reply from you. Wire reply collect. Also please advise me what representations you made to Justice Dept. re security of the seamen."

As yet, up to 3 P.M. on this 31 day of December, 1946, counsel has received no reply.

B.

JURISDICTION.

The jurisdiction of this Court to entertain this petition for rehearing rests upon Rule 33 of the rules of this Court.

C.

CERTIFICATE OF COUNSEL.

In accordance with Rule 33 of the Rules of this Court, counsel hereby certifies that this petition is filed in good faith and not for purposes of delay.

D.

THE REASON WHY A REHEARING SHOULD BE GRANTED.

The foregoing telegraphic correspondence illustrates most graphically the reason why no court should ever rely upon unsworn, vague, hearsay representations, which cut to the heart of the principal issue in a case. Here we have on the record an uncontradicted statement that these Indonesians, if deported, would probably be punished by the Dutch Government, either by imprisonment, or maybe by death. The Justice Department, in the face of this record, makes unsworn, hearsay contrary representations to the Court, upon the basis of which, apparently, the Court denied the petition for certiorari.

On December 28, 1946, for the first time, counsel obtained an unofficial copy of the draft agreement between the Dutch Government, represented by the Commission General, and the Government of the Republic of Indonesia, represented by the Indonesian delegation, which, according to press reports, was ratified by the Dutch Parliament on December 20, 1946. A copy of this agreement is found in Appendix B.

It contains no word of amnesty. And yet ever since the 16th day of December, 1946, the Attorney-General and the Netherlands Ambassador have consistently declined to answer counsel's question of whether or not the treaty did contain an amnesty clause.

To this date, counsel has no assurances, upon which any reliance can be placed by anyone, that these Indonesian seamen are less in jeopardy than when the petition for habeas corpus was filed on June 12, 1946.

The Attorney-General's wire of December 20, 1946, to counsel refers to assurances by the Dutch authorities transmitted to the Department of Justice by the State Department, and yet the Dutch Ambassador in Washington refuses to confirm such assurances, except to refer to alleged assurances given to Leo Gallagher, in Los Angeles, many months ago, which assurances Dr. Van Woerden, the Dutch Consul here, says no one on the Pacific Coast had authority to give.

The reluctance of all parties in interest to confirm the alleged assurances made by the Dutch Government with respect to the safety of these Indonesians is easily understood in the light of a cablegram received this morning, December 31, 1946, even as counsel is preparing this petition. This cablegram is a reply to one sent on December 21, 1946, by the Committee for Indonesian Freedom, in San Francisco, to the Indonesian Federation of Labor Unions, in Singapore, commonly known as the P.K.B.I., and a copy of which cablegram is as follows:

> "Please cable back whether agreement in Indonesia is definite in view of deportation of Indonesian seamen from America and safe arrival in Republic."

The reply of P.K.B.I., addressed to the Committee for Indonesian Freedom, in San Francisco, and received here today, reads as follows:

> "Agreement not yet ratified Complete Dutch blocade and fighting on all fronts Please wait."

Here is the definitive evidence that the agreement set forth in Appendix B hereof has not yet been ratified, is not in effect, and that the war waged by the Dutch upon the Indonesians continues with renewed ferocity. It is no wonder, under these circumstances, that the Netherlands Ambassador in Washington is unwilling to give counsel categorical assurances concerning the safety of petitioners, if deported.

Under these circumstances, the Dutch Government is not to be trusted. The record of that Government, as far as Indonesia is concerned, is shameful. On December 7, 1942, Queen Wilhelmina promised the Indonesian people a full and equal partnership with the Dutch Government, a promise cynically realized in the Dutch Government's effort to stifle Indonesian freedom by force of arms. This is the same Dutch Government which fled from Indonesia upon the approach of the Japanese, and left the Indonesians to defend themselves as best they could. This is the same Dutch Government whose ambassador in Washington declines to answer legitimate questions propounded to him by counsel.

Under these circumstances, may counsel be permitted to doubt the sincerity and integrity of this Dutch Government. May counsel call to the attention

of the Court that the feeling of Indonesians in America is that the recent negotiations, culminating in the draft agreement set forth in Exhibit B hereof, and not yet ratified, are merely a blind, designed to keep the Indonesian question off the agenda of United Nations until that organization should adjourn its New York sessions.

Under these circumstances, we earnestly urge upon the Court, if its decision denying the petition for certiorari was at all influenced by the slipshod, careless, unsworn, hearsay statements of the Department of Justice, to grant a rehearing, for the purpose of determining factually whether or not these Indonesians are in jeopardy of their lives. The record of the Department of Justice throughout this case reflects little credit upon it. The curt, autocratic, and arbitrary denial of a stay, so that other branches of the Government, the executive and legislative, might intervene in this matter, as both have done on previous occasions, is an index of the persecution to which these Indonesians have been subjected by the Department of Justice under the guise of routine deportation proceedings. Evidently the Attorney-General fears that his prey might escape him, either by an Executive Order, similar to that made by the President in the case of the 48 Estonians, or by Resolution of Congress, such as was introduced by Senator Langer at the 79th Congress.

If, therefore, the representations made by the Department of Justice played any role in the decision

of this Court to deny the petition for certiorari, a rehearing should be granted, to determine whether or not there is any factual basis for the representations so glibly made.

Dated, San Francisco, California,
January 6, 1947.

Respectfully submitted,
HAROLD M. SAWYER,
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(Appendices A and B Follow.)

Appendix A

"THE HAGUE, Dec. 20 (U.P.)—The lower chamber of the Netherlands Parliament today approved an Indonesian agreement providing for a proposed United States of Indonesia within the Dutch empire.

"The vote was 65 to 30. It was on a motion by Professor C. Romne, Catholic parliamentary leader, to support the government's Indonesian agreement.

"A commission general for Indonesia will be authorized to sign an agreement which it has negotiated with the Indonesia republic."

Appendix B

"DRAFT AGREEMENT

The NETHERLANDS GOVERNMENT, represented by the Commission General, and the GOVERNMENT OF THE REPUBLIC OF INDONESIA, represented by the Indonesian delegation, moved by the sincere desire to ensure the good relations between the peoples of the Netherlands and Indonesia in new forms of voluntary cooperation, which offer the best guarantee for a sound and strong development of both countries in the future, and which make it possible to give a new foundation to the relationship between the two peoples, agree as follows, and will submit this agreement at the shortest possible notice to the approval of the respective parliaments:

"Article 1: The Netherlands Government recognizes the Government of the Republic of Indonesia as exercising the de facto authority over Java, Madura and Sumatra. The areas occupied by Allied or Netherlands forces shall be included gradually, through mutual co-operation, in the Republic territory. To this end the necessary measures shall at once be taken in order that this inclusion shall be completed, at the latest, on the date mentioned in Art. 12.

"Article 2: The Netherlands Government and the Government of the Republic shall co-operate in the rapid formation of a sovereign, democratic state on a federal base, to be called the United States of Indonesia.

"Article 3: The United States of Indonesia shall comprise the entire territory of the Netherlands-Indies, with the proviso, however, that in case the population of any territory, after due consultation with the other territories, should decide by democratic process that they are not or not yet willing to join the United States of Indonesia, there can be established a special relationship for such a territory to the States and to the Kingdom of the Netherlands.

"Article 4: Component parts of the United States of Indonesia shall be the Republic, Borneo and the Great East, without prejudice to the right of the population of any territory to decide by democratic process that its position in the United States of Indonesia shall be arranged otherwise.

"Without derogating from the provisions in Article 3 and in the first paragraph of this Article, the United States of Indonesia may make a special arrangement concerning the territory of their capital.

"Article 5: The constitution of the United States of Indonesia shall be determined by a constituent assembly composed of democratically nominated representatives of the Republic and of the other future partners of the United States, to which the following paragraph of this article shall apply.

"Both parties shall consult each other on the method of participation in this constituent assembly by the Republic, by the territories not under the authority of the Republic, and by the groups of the population not or insufficiently represented, with due observance of

the responsibility of the Netherlands Government and of the Government of the Republic respectively.

"Article 6: To promote the joint interests of the Netherlands and Indonesia, the Netherlands Government and the Government of the Republic shall co-operate in the establishment of a Netherlands-Indonesian Union, by which the Kingdom of the Netherlands, the Netherlands-Indies, Surinam and Curacao, shall be converted into the said Union, consisting on the one hand of the Kingdom of the Netherlands, comprising the Netherlands, Surinam and Curacao, and on the other hand the United States of Indonesia.

"The foregoing paragraph does not exclude the possibility of a further arrangement of the relations between the Netherlands, Surinam and Curacao.

"Article 7: (1) The Netherlands-Indonesian Union shall have its own organs to promote the joint interests of the Kingdom of the Netherlands and the United States of Indonesia.

"(2) These organs shall be formed by the Governments of the Kingdom of the Netherlands and the United States of Indonesia and, if necessary, by the Parliaments of those countries.

"(3) As joint interests shall be considered co-operation on foreign relations, defence and, as far as necessary, finance, as well as subjects of an economic or a cultural nature.

"Article 8: The King (Queen) of the Netherlands shall be at the head of the Netherlands-Indonesian

Union. The decrees and resolutions concerning the joint interests shall be issued by the organs of the Union in the King's (Queen's) name.

"Article 9: In order to promote the interests of the United States of Indonesia in the Netherlands and of the Kingdom of the Netherlands in Indonesia, High Commissioners shall be appointed by the respective governments.

"Article 10: The Statute of the Netherlands-Indonesian Union shall furthermore contain provisions regarding:

"a. the safeguarding of the rights of both parties towards one another and the guarantees for the fulfillment of their mutual obligations;

"b. the mutual exercise of civic rights by Netherlands and Indonesian citizens;

"c. a regulation containing provisions in case no agreement can be reached by the organs of the Union;

"d. a regulation of the manner and the conditions of the assistance to be given by the services of the Kingdom of the Netherlands to the United States of Indonesia, as long as the services of the latter are not or insufficiently organized.

"e. the safeguarding in both parts of the Union of the fundamental human rights and liberties, referred to in the Charter of the United Nations Organisation.

"Article 11: (1) The Statute of the Union shall be drafted by a conference of representatives of the Kingdom of the Netherlands and of the future United States of Indonesia.

"(2) The Statute shall come into effect after approval by the respective parliaments.

"Article 12: The Netherlands Government and the Government of the Republic shall endeavour to establish the United States of Indonesia and the Netherlands-Indonesian Union before January 1st, 1949.

"Article 13: The Netherlands Government shall forthwith take the necessary steps in order to obtain the admission of the United States of Indonesia as a member of the United Nations Organisation, immediately after the formation of the Netherlands-Indonesian Union.

"Article 14: The Government of the Republic recognises the claims of all non-Indonesians to the restoration of their rights and restitution of their goods as far as they are exercised or to be found in the territory over which it exercises de facto authority. A joint commission will be set up to effect this restoration and restitution.

"Article 15: In order to reform the government of the Indies in such a way that its composition and procedure shall conform as closely as possible to the recognition of the Republic and to the projected constitutional structure, the Netherlands Government, pending the realisation of the United States of Indonesia and of the Netherlands-Indonesian Union, shall forthwith initiate the necessary legal measures to adjust

the constitutional and the international position of the Kingdom of the Netherlands to the new situation.

"Article 16: Directly after the conclusion of this agreement both parties shall proceed to reduce their armed forces. They will consult together concerning the extent and the rate of this reduction and their co-operation in military matters.

"Article 17: (1) For the co-operation between the Netherlands Government and the Government of the Republic contemplated in this agreement, an organisation shall be called into existence, consisting of delegates to be appointed by each of the two governments, with a joint secretariat.

"(2) The Netherlands Government and the Government of the Republic shall settle by arbitration any dispute, which might arise from this agreement and which cannot be solved by joint consultation in a conference between these delegations. In that case a Chairman of another nationality with a deciding vote shall be appointed by agreement between the delegations, or if such an agreement cannot be reached, by the President of the International Court of Justice.

"FINAL CLAUSE.

"This agreement shall be drawn up in the Netherlands and the Indonesian languages. Both texts shall have equal authority.

"BATAVIA,
"15th November, 1946."